

REDRESS

Ending Torture, Seeking Justice for Survivors

Representing Victims before the ICC:

**Recommendations on the Legal
Representation System**

April 2015

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REPRESENTING VICTIMS BEFORE THE ICC: RECOMMENDATIONS ON THE LEGAL REPRESENTATION SYSTEM

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I. Introduction

This Report is about the system of legal representation for victims before the International Criminal Court (ICC). Effective legal representation is a condition precedent for meaningful victim participation which is itself a key component of the Rome Statute. But in practice it has been difficult to achieve. The purpose of the Report is to draw attention to some of the challenges to implement effectively the system of legal representation for victims and to encourage reflection on how these might be addressed.

REDRESS convened a seminar in November 2014 (hereinafter REDRESS' November 2014 Seminar) in which counsel for victims, intermediaries, representatives of the Registry and others were invited to discuss how to strengthen victims' legal representation and overcome the range of identified challenges. This Report reflects many of the discussions which arose at the November 2014 Seminar and additional research carried out by REDRESS. We hope that this Report will be useful to the Court in its ongoing efforts to strengthen its procedures.

We are extremely grateful to the Registry and in particular its Victim Participation and Reparations Section for agreeing to host the seminar at the premises of the Court and for enabling a full and frank exchange of views. The views and concerns set out in this Report do not necessarily reflect the views of the Registry or other meeting participants. We are also extremely grateful to the Open Society Foundation, Humanity United, the Ministry of Foreign Affairs of Finland, the Estonian Ministry of Foreign Affairs and the John D. and Catherine T. MacArthur Foundation for supporting REDRESS' work. We also thank Artida Minga, Alice Kidman and Maimouna-Lise Pouye Rabatel-Fernel for their research and related assistance.

In summary

In this Report, we analyse the current framework governing the appointment of legal representatives of victims (LRVs) as well as Common Legal Representatives of Victims (CLRV). We address what we consider to be the key factors governing the selection of counsel for victims and analyse victims' limited opportunities to challenge such appointments. We also analyse the practice of legal representation. We assess whether there may be a need to better spell out lawyers' roles and responsibilities, and review the difficulties faced by counsel when communicating and taking instructions from victims and how to overcome them. We consider whether additional monitoring mechanisms may help, and what these might look like, and/or whether the current disciplinary framework is adequate to address actual or perceived under performance.

The following issues are highlighted:

- ***How to strengthen consultations with interested victims in relation to the appointment of counsel***

Victims have the right to appoint counsel of their own choosing; or in instances when common legal representation is imposed by the Court, victims should be assisted to choose a common legal representative (Rule 90(1)-(2) of the Rules of Procedure and Evidence). However, to date, insufficient attention has been paid to these rights and victims' choice has become the exception rather than the rule. While consultation of victims is inherently complex particularly when involving vast numbers of persons, arguably the attempts to consult victims about their choice of counsel in the cases before the Court have been limited and/or unsatisfactory; in some cases, there has been virtually no consultation.

Sometimes, what appear to be arbitrary decisions have been taken to change counsel appointments mid-way through proceedings. In the absence of a clearly articulated reason to do so, the decision to change counsel can appear to lack transparency, be disconcerting for victims who may have formed a bond with counsel, and can possibly amount to an indirect sanction of the prior appointed counsel (but without the necessary due process). It is also arguably an inappropriate intrusion in the independent counsel-client relationship.

Another difficulty is that most victims are not aware of the possibility to challenge the appointment of counsel put forward by the Registry, even though the Regulations of the Court specifically provide for this possibility.

- ***How to clarify the specific roles and tasks expected of counsel representing victims; if, how and by whom should counsel's performance be monitored? What are the logistical and budgetary constraints affecting the effectiveness of victims' legal representation and how can these be addressed?***

Another concern relates to the quality of legal representation victims receive. The Court's framework remains 'victim blind' with regards to the qualities victims' counsel should possess and the standards they should uphold when representing victims. This makes it difficult to assess objectively counsel performance; despite this, concerns have been raised about under-performance. Some counsel will be representing large groups of victims for perhaps the first time within a very specific context which raises a variety of challenges such as security, physical and psychological protection needs, and specific ethical considerations for group claims. In addition, severe budget restrictions limit the ability of counsel to consult effectively with their clients, which can also negatively impact representation in Court. Thus, under-performance, where it is an issue, can be a product of any of these factors.

Serious breaches of the Code of Conduct (applicable to all counsel) can result in formal proceedings being initiated before a specially constituted independent disciplinary panel. Questions have arisen as to how to address under-performance which does not arise to the level of a disciplinary breach. Should the Registry have a role in addressing this, and if so, what should that role be? On the one hand, there is a worry that the Registry may use its position as controller of legal aid as a vehicle to informally sanction under-performing counsel, without regard to due process. At the same time, there is a concern that the OPCV could be doing more to support external counsel; this support function was envisioned to be a key component of its mandate.

II. The Appointment of Counsel

Victims participating in ICC proceedings have the right to appoint counsel of their own choosing. However, this right is not absolute;¹ ‘this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court.’² A Chamber may ‘request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives’, ‘when there are a number of victims’ and in order to ensure ‘the effectiveness of the proceedings.’³ As explained by Trial Chamber II, common legal representation is principally aimed at ‘reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible.’⁴ The ICC jurisprudence has clarified that the approach to the organisation of common legal representation ‘should not be rigid, and instead will depend on whether at a certain phase in the proceedings or throughout the case a group or groups of victims have common interests which necessitate joint representation.’⁵

Rule 90 of the Rules of Procedure and Evidence establishes a phased approach whereby:

- 1) a Chamber may ‘request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives’ (Rule 90(2));
- 2) ‘if victims are unable to do so within a time limit set by the Chamber, the Chamber may request the Registrar to choose one or more legal representatives for them.’ (Rule 90(3))

In practice the Court has often ignored the first step in the process; it has appointed counsel for victims itself rather than facilitated victims’ agency in choosing for themselves. And, when counsel has been chosen by the Court, the Court’s selection process appears *ad hoc* or opaque.

Also, Chambers and Single Judges have increasingly resorted to appointing counsel themselves under Regulation 80(1) of the Regulations of the Court which provides that ‘where the interests of justice so require’ a Chamber may on its own appoint a legal representative, including counsel from the OPCV, following consultation with the Registrar.⁶ As will be discussed, this has negatively impacted victims’ ability to challenge appointments of counsel.

¹ *Banda & Jerbo*, ‘Decision on common legal representation’, ICC-02/05-03/09-337, Trial Chamber IV, 25 May 2012, paras 12-13; Trial Chamber II also ruled that ‘[t]he Chamber considers, therefore, that the freedom to choose a personal Legal Representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require’ [*Katanga & Ngudjolo*, ‘Order on the organisation of common legal representation of victims’, ICC-01/04-01/07-1328, 22 July 2009, paras. 10-18]. See also, *L.Gbagbo*, ‘Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings’, ICC-02/11-01/11-138, Pre Trial Chamber I, 4 June 2012, para. 35.

² *Katanga & Ngudjolo*, ICC-01/04-01/07-1328, *Ibid*, para 11.

³ Rule 90(2) of the Rules of Procedure and Evidence (RPE).

⁴ *Katanga & Ngudjolo*, ICC-01/04-01/07-1328, *supra* note 1, paras. 10(b), 11; *Bemba*, ‘Decision on common legal representation of victims for the purpose of trial’, ICC-01/05-01/08-1005, Trial Chamber III, 10 Nov. 2010, para. 9; and *Ruto, Kosgey & Sang*, ‘Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings’, ICC-01/09-01/11-249, Pre-Trial Chamber II, 5 Aug. 2011, para. 65.

⁵ *Lubanga*, ‘Decision on victims’ participation’, ICC-01/04-01/06-1119, Trial Chamber I, 18 Jan. 2008, para. 125.

⁶ Regulation 80(1) Regulations of the Court.

II.1 Common Legal Representation Should Not Automatically Curtail Private Counsel

In accordance with the Rules of Procedure and Evidence, victims can choose who will represent them in the proceedings. This is reflected in the information that the Court's VPRS shares with victims⁷ as well as in the Court's standard form that victims are asked to fill in when seeking to participate in the proceedings. The standard form requests victim to indicate whether they:

- 1) already have a lawyer (and if yes to provide his/her contact details);
- 2) wish to receive the Court's assistance to identify a lawyer; and
- 3) would like to be represented by the Office of Public Counsel for Victims until they have a lawyer.⁸

When the ICC Prosecutor opens an investigation into a particular situation, victims may have already engaged local and/or international lawyers with regards to what happened to them. Some may have received assistance to seek remedies through local justice mechanisms or truth commissions or to pursue human rights claims. Sometimes, a local organisation assisting victims to apply to participate in the proceedings may have a pre-existing relationship with a lawyer who may already be consulting with victims during the application process. This is particularly true when a significant amount of time elapses between the opening of a situation and the opening of a case before the ICC. As pointed out by one lawyer from Mali, despite the referral to the ICC over two years ago and ongoing investigations, 'nothing has moved before the ICC.' In the meantime, domestic proceedings have been brought by victims who are informed and organised by NGOs assisting them in the proceedings.⁹ Victims can thus already be in contact with a lawyer and solicit their services in relation to proceedings before the ICC.

In the Democratic Republic of the Congo (DRC) situation, the first applications from victims to participate in proceedings were filed by the International Federation for Human Rights (FIDH), with a mandate authorising one lawyer that was part of their network to represent the victims (Me Daoud).¹⁰ In the *Lubanga* case, victims had appointed eight different lawyers prior to the Chamber's decision on their status as participants in the trial; all had been identified by local or international organisations that assisted victims throughout the application phase, when no legal aid was available.¹¹ In the *Katanga* case, victims also identified eight separate lawyers in their applications to participate.¹² In the *Banda and Jerbo* case, six lawyers were originally appointed by victims to represent their interests in the case. As expressed by one lawyer 'there was, at the beginning of the Court's operations, an important participation that did not cost anything to the Court, by NGOs and lawyers who invested personally and pro bono in many of the cases, sometimes over many years.'¹³

Common legal representation has been imposed in all cases that have proceeded to trial and the Registry has made it clear that it now consistently recommends 'a single legal team [to represent]

⁷ ICC, *Victims Before The International Criminal Court, A Guide For The Participation Of Victims In The Proceedings of The Court*, at 17, available at <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>.

⁸ ICC, *Standard Application Form for Individuals*, at 6, available at <http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf>.

⁹ FIDH, *Complaint filed on behalf of 80 victims of rape and sexual violence during the occupation of northern Mali: response by Malian judiciary to victims' need for justice is essential without delay*, 12 November 2014, available at <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/mali/16455-mali-complaint-filed-on-behalf-of-80-victims-of-rape-and-sexual-violence>.

¹⁰ *Situation in the DRC*, 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6', ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 Jan. 2006.

¹¹ Mr Luc Walley; Mr Franck Mulenda; Ms Carine Bapita Buyangandu; Mr Joseph Keta Orwinyo; Mr Jean Louis Gilissen; Mr Jean Chrysostome Mulamba Nsokoloni; Mr Paul Kabongo Tshibangu and Mr Hervé Diakiese.

¹² Me Carine Bapita Buyangandu; Me Joseph Keta; Me Jean Louis Gilissen; Me Hervé Diakiese; Me Jean Chrysostome Mulamba; Me Fidel Nsita Luvengika; Me Vincent Lurquin and Me Flora Mbuyu Anjelani.

¹³ Comment made by one LRV during REDRESS' November 2014 Seminar.

victims in a particular case.¹⁴ Thus, common legal representation has increasingly been equated with the representation of all victims in a case by a single counsel, regardless of the number of victims participating, the number of counsel representing victims already or of whether the costs of legal representation will be borne by the Court.¹⁵ Yet, it would be important for the Registry, and the relevant Chambers to consider whether in the particular circumstances of any given case, representation by counsel already appointed by victims or groups of victims could usefully be retained, particularly when those counsel would not rely on the financial assistance of the Court, and/or where separate representation of certain subsets of victims is warranted because of the particularities of their situation or their claims. In that regard, we note that it is not uncommon in domestic criminal cases where civil parties can participate, for them to be represented by more than one counsel.

In addition, the Court could explore further how counsel originally appointed by victims could remain involved even when common legal representation is ordered. Such counsel will often have valuable knowledge about the victims' situation and benefit from their trust. Some counsel have suggested that the Court might explore models whereby networks of LRV could retain their individual appointments under the coordination of a single CLRV:

Obviously you need to look at focusing representation when you have so many victims and so many interests, but that doesn't mean that you can't underneath that have a network of legal representatives who work for different groupings and bring them together to a central point. [...] You can't hope to have one person representing thousands of people. It has to be done through a very organised network of legal representatives [...] much like a class action [where different groups of victims] don't just give up their lawyers when they come together in the class action.¹⁶

This is the framework currently applied before the Extraordinary Chambers in the Courts of Cambodia (ECCC) where common legal representation of all the victims in a case co-exists with representation by lawyers appointed directly by the victims or groups of victims.¹⁷

It is unlikely that the ICC could remunerate both a CLRV and counsel originally appointed by victims; some of the lawyers involved in ECCC proceedings have indicated that the ECCC model does not work very well, in part because only the common legal representatives (Lead Co-Lawyers) are paid by the Court. Thus the feasibility of such options would need to be explored if they were to be adopted by the ICC, taking into account the specificity of the ICC framework. A positive aspect of the ECCC framework is that it encourages collaborations with pro bono counsel and civil society groups which occasionally have managed to afford significant support, expertise and resources to victim legal representation which would have otherwise not been available to the Lead Co-Lawyers. In addition, the Lead Co-Lawyers rely extensively on the private lawyers to ensure contacts and direct consultations with the victims. Under the ICC model, only the court-appointed CLRV is able to represent victims, regardless of any pro bono or privately funded support individual victims may have managed to secure, and it is only the CLRV that is responsible for client contact (use of intermediaries aside). At the least, the ICC should consider the possibility to adjoin counsel originally appointed by victims to the team of a CLRV appointed by the Court to appear alongside CLRV either generally or at

¹⁴ Comment made by participant during the REDRESS November 2014 Seminar. However, victims' choice has also not been taken into account in cases where lawyers were privately funded: In the *Banda and Jerbo* case, when requesting that their clients be represented separately in light of a potential conflict of interest with other participating victims, Sir Geoffrey Nice QC and Rodney Dixon QC specifically indicated that they were privately funded and as a result would not request resources from the Court. This did not influence the ultimate decision appointing a single common legal representation team nor the recommendation of the Registry in that regard.

¹⁵ *Ibid.*

¹⁶ Comment by one Counsel, REDRESS November 2014 Seminar.

¹⁷ At the ECCC, civil party lawyers appointed by victims retain their individual mandates even after the appointment of Civil Party Lead Co-Lawyers who represent the interests of the consolidated group comprised of all the victims in the case.

least at specific stages of the proceedings, such as opening/closing statements or reparation proceedings.

II.2 Challenges for the Registry to Assist Victims to Choose a CLRV

While the assistance of the Registry is not mandatory, victims may be spread over large distances, not speak the same language or simply be too many to coordinate the appointment of CLRV on their own. In practice, Chambers have thus often suggested – or requested- that the Registry assist victims with a view to choosing a common legal representative pursuant to Rule 90(2).¹⁸ While this was originally understood as trying to secure a consensus amongst counsel previously appointed by victims,¹⁹ the Registry has moved away from that practice to suggest consultation should take place directly with victims.²⁰ For example, in the *Banda and Jerbo* case, when the lawyers appointed directly by victims came forward with their own proposals regarding common legal representation, the Registry submitted that ‘the views and proposals by the legal representatives [could not] be treated as an “agreement among the victims themselves” as required under Rule 90 of the Rules’²¹ and advanced concerns that victims might be pressured by counsel when asked to choose a CLRV.²² This position has been echoed in discussions with various staff from the Registry who have expressed concerns at a practice whereby some lawyers go out to ‘fish for victims’ at the application stage with the hope of being appointed CLRV later on. The main worry is that victims may be inclined to appoint counsel only because they do not know anyone else, because the intermediaries assisting them have suggested the name of a counsel they know or worse, because the lawyer who approached them made promises in return for the victims appointing them.²³

This move to consult directly with victims is a welcome shift as a matter of principle; however each case should be looked at on its own facts. Victims may have already appointed a lawyer in relation to domestic or other proceedings, such as human rights complaints, prior to the opening of the ICC case. Furthermore, care must be taken by the Registry to avoid introducing new stipulations and controls that are not necessarily for them to control. The move away from consulting counsel may also reflect a broader distrust in external counsel from the Court.²⁴ Yet, legal representatives are required to represent the interests of their clients only and as a result a presumption of trust should exist when they have been appointed by victims.

¹⁸ In the *Banda and Jerbo* case, Trial Chamber IV requested the victims ‘in accordance with Rule 90(2) of the Rules, [...] with the assistance of the Registry, to choose their common legal representative to act on their behalf throughout the proceedings in this case.’ [*Banda & Jerbo*, ‘Order instructing the Registry to start consultations on the organisation of common legal representation’, ICC-02/05-03/09-138, 21 April 2011, para 5]. See also, *Ruto, Kosgey & Sang*, ‘First Decision on Victims’ Participation in the Case’, ICC-01/09-01/11-17, Pre-Trial Chamber II, 30 March 2011, para 24; *Katanga & Ngudjolo*, ICC-01/04-01/07-1328, *supra* note 1.

¹⁹ In the *Lubanga* case, it led to a framework where all counsel were retained as part of two legal representation ‘teams’. In the *Katanga* and *Ngudjolo* case, counsel failed to agree and the Registry proceeded to appoint counsel under Rule 90(3).

²⁰ The Registry has indicated that direct consultations with victims were preferable as a matter of principle. Such consultations also avoided the risk that counsel consulted could be conflicted by their own interest in being appointed as common legal representative. See, e.g., *Ruto, Kosgey & Sang*, ‘Proposal for the common legal representation of victims’, ICC-01/09-01/11-243, Registry Filing, 1 August 2011, para 7.

²¹ *Banda & Jerbo*, ‘Report on the organization of the common legal representation’, ICC-02/05-03/09-187, 5 August 2011, para 5.

²² *Banda & Jerbo*, ‘Report on the implementation of the Chamber’s order instructing the Registry to start consultations on the organisation of common legal representation’, ICC-02/05-03/09-164-RED, Registry filing, 21 June 2011, para 13.

²³ While such practices do not appear generalised, these concerns have been voiced both by Registry officials, intermediaries working with victims and counsel themselves in discussion with REDRESS. As expressed by one lawyer, in Kenya, ‘there was a free-for-all from the local lawyers who thought that the more victims they got, the better their chances of actually representing the victims.’ As a result, ‘they promise[d] the victims the world [and it is logical that] victims will decide to go to the lawyer who is promising them the most.’ REDRESS November 2014 Seminar. The Registry also noted ‘a practice on the part of some counsel, according to which they have developed a relationship with an intermediary who then ensures that the counsel’s name is added to the application forms of the victims whom the intermediary has contact with. While this may, in some circumstances, constitute the best means by which to reach large numbers of victims, particularly where legal aid has not yet been made available, it cannot be said that those who have engaged in this process have yet established a relationship with the victims themselves.’ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-243, *supra* note 20, para 22.

²⁴ This view was also expressed by one participant in the REDRESS November 2014 Seminar who suggested that ‘there is already some kind of negative impression [of counsel] before they begin [their work]. There is suspicion.’

A further concern is what happens next. It may well be appropriate for the Registry (or the Court) to prioritise consultations with victims over and above the consultations they would normally undertake with victims' counsel, but then the adequate facilities to carry out such consultations must be put in place.

Regulation 112 of the Regulations of the Registry, as amended in December 2013, sets out that 'in order to assist victims in choosing a legal representative or representatives in pursuance of rule 16, sub-rule 1(b) or rule 90, sub-rule 2, the Registry:

- may provide victims with information on qualified counsel and common legal representation [...];
- shall inform victims that it may choose a common legal representative for victims at the request of the Chamber pursuant to rule 90, sub-rule 3 and/or organise a process for the selection of common legal representatives through a public call for the expression of interest from those counsel who meet the requirements of rule 22 [...];
- shall take appropriate measures, such as outreach activities in the field, to ensure that victims understand such information [...];
- may also, in pursuance of these rules, *consult victims regarding their preferences in respect of legal representation*. [Emphasis added]

The Registry has recognised the importance of consulting victims, however it has submitted that the limited time and resources available when ordered by the Court to assist victims to choose a CLRV often did not allow it to conduct adequate consultations.²⁵ While the scope or framework of a case is only defined by the Document Containing the Charges of the Prosecutor's office which is only made public a number of days before the confirmation of charges hearing, arguably more could be done earlier, and as stressed by some counsel, some work could start on the basis of an arrest warrant.²⁶ The Registry has also explained that 'a proposal [on counsel] is likely to be made by victims only rarely, and then only if the Registry is in a position to provide significant assistance.'²⁷

For all these reasons, the Registry has suggested that it is more appropriate to focus its limited resources on identifying a suitable candidate to be appointed as CLRV through a more systematic approach to common legal representation, as set out in Section II.4, below.

II.3 Victims' Choice of CLRV under Rule 90 Under-Utilised

Rule 90 foresees a sequential approach whereby when the need for common legal representation arises, victims should first be asked to choose a CLRV, if necessary with the assistance of the Registry. If victims are unable to choose within a timeframe set by the Chamber, then that Chamber can ask the Registrar to appoint a CLRV. However, most CLRV appointed recently have been appointed by the Chamber or the Registry, without a prior attempt having been made to assist victims to choose counsel.

Resources and time constraints have been advanced to justify the failure to engage victims on their choice of counsel. At the Pre-Trial phase of the *Ruto et al* case, the Single Judge instructed the VPRS 'to take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with Rules 16(l)(b) and 90(2) RPE.'²⁸ However, the

²⁵ In *Banda and Jerbo*, the Registry indicated that full consultations with victims could not be undertaken within the timeframe set by the Chamber. *Banda & Jerbo*, ICC-02/05-03/09-164-RED, *supra* note 22.

²⁶ Comment by one participant, REDRESS November 2014 Seminar.

²⁷ *Gbagbo*, 'Proposal for the common legal representation of victims', ICC-02/11-01/11-120-Anx 1, Registry Filing, 16 May 2012, para. 5.

²⁸ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-17, *supra* note 18, para 24.

Registry later informed the Chamber that it had only conducted limited consultations with victims due to resource and workload constraints. It then proceeded with selecting a CLRV relying on views expressed by some victims during earlier stages of the proceedings and recommended that the Chamber appoint the CLRV without reaching a determination that ‘the victims are unable to choose a common legal representative’ or unable to choose ‘representatives within a time limit that the Chamber may decide.’²⁹ The Chamber endorsed the Registry’s choice without inquiring into whether victims had been given a genuine opportunity to choose counsel for themselves.

Some intermediaries have indicated that sometimes Chambers decisions do not match the realities on the ground.³⁰ Referring to the application process organised in *Ntaganda* where victims were also to be consulted on legal representation, one intermediary explained that outreach was undertaken superficially in light of the limited time available to cover the various locations.³¹ He stressed that before a victim is ready to fill out an application form or indicate his/her preference regarding legal representation, one first has to explain to the victim what the Court is, what it does, etc. He also highlighted challenges with the process of consulting victims explaining that in some cases victims had to come to apply to participate *en masse*, with traditional leaders present - a process that was not conducive to proper consultations.³² In other instances, reaching the location of the victims is extremely difficult.³³ The short timeframes granted by judges for consultations to take place can therefore be unrealistic. Sufficient time should be afforded to facilitate victims’ choice.

Resource and practical challenges are sometimes used to justify the lack of, or minimal consultations. But REDRESS is also concerned that there is an impression among some within the Court that victims are simply incapable of choosing a counsel themselves, and that the Court is better placed to do so. The Registry has expressed the view that, even with assistance, it is unlikely that victims, as a group, will ultimately be able to choose common legal representatives. In the *Banda and Jerbo* case, the Chamber ‘request[ed] the victims, with the assistance of the Registry, to choose their common legal representative to act on their behalf throughout the proceedings in this case’ and set a deadline for them to do so. The Registry indicated two months later, and two days before the deadline, that it had not conducted consultations with victims.³⁴ In its filing, it questioned the usefulness of conducting further consultations and advanced that:

on balance, conducting further meetings with the victims at this stage will not in practice enable the victims themselves, as a group, to choose common legal representatives, so the Registry in any event will need to submit a proposal in accordance with [Rule90(3) as per] the Chamber’s order.³⁵

Referring to resource and logistical constraints, the Registry concluded that it would be ‘preferable to rely on input received already as regards their wishes relating to legal representation and to apply objective criteria aimed at achieving quality legal representation in the best interests of the victims.’³⁶ The Chamber endorsed that proposal.³⁷

Relying on input already received from victims is potentially an efficient approach. However, in these particular cases, the Registry sought to rely on input that was received sometimes years before. The

²⁹ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-243, *supra* note 20.

³⁰ REDRESS November 2014 Seminar.

³¹ *Ibid.*

³² *Ibid.*

³³ He explained that in the DRC, one sometimes has to go through villages that are hostile to the Court to reach the location of the victims, which impairs outreach work. *Ibid.*

³⁴ *Banda & Jerbo*, ICC-02/05-03/09-164-RED, *supra* note 22, paras. 13-14.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Banda & Jerbo*, ICC-02/05-03/09-337, *supra* note 1.

Registry itself acknowledged that the views of victims may have changed since.³⁸ It is also not always made clear to victims that the views they express regarding general criteria they want a counsel to meet, will in turn be used to choose a counsel for them.³⁹

Some Chambers and Single Judges have skipped the step envisaged in Rule 90 (1) and (2) altogether. For example, at the Pre-trial stage of the *Ntaganda* case, the Single Judge required all victims to fill out a new simplified form, which did not allow applicants to indicate whether they were already represented and/or to provide the name of their lawyer.⁴⁰ In that case, the charges against the accused overlapped with the ones against Thomas Lubanga whose trial had already concluded. Some victim applicants had already been assisted for many years by lawyers in the context of the *Lubanga* case. One counsel expressed his disappointment in the process and explained that ‘those victims who gave power of attorney to various counsel, including those who were already participating through counsel in the *Lubanga* case, did not receive any feedback whatsoever.’ He adds that the lawyers appointed by these victims were not informed either.⁴¹

II.4 The Registry’s New Approach to Consultation: ‘Consultation-Lite’

The Registry has over time developed an approach whereby, when selecting counsel, it seeks victims’ general views on the elements that are most important to them in a CLRV. These consultations are not focused on whether victims might prefer one individual over another, but on what qualities they might wish to see in their lawyer. Victims are neither consulted on the specific candidate selected by the Registry nor involved in the selection process itself. This counters the express possibility recognised under Rule 90(2) for the Registry to ‘provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or *suggesting one or more common legal representatives*’ (emphasis added). It is not clear why one or more candidates identified by the Registry through a transparent and open selection process could not in turn be proposed to victims, as envisaged by Rule 90(2), as was done in the *Katanga* case.⁴²

A public call for expressions of interest is then sent to all counsels on the ICC list of counsel and shortlisted applications are then interviewed by a panel. But, the selection panel is only composed of Registry officials and, sometimes, officials from other tribunals.⁴³ To date, external counsels have not been part of such panels apparently because ‘it has been considered that the ICC has all the expertise required regarding victim participation and representation.’⁴⁴ Victims are also not represented. The reasoning as to why one counsel is selected instead of another – including counsel originally appointed directly by victims - is not made public. As a result the selection process has appeared opaque to victims, intermediaries working with them and counsel.⁴⁵ For example, in *Banda and*

³⁸ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-243, *supra* note 20, para 6 ; In *Banda & Jerbo*, the Registry recognised that ‘the views [previously] expressed may have since changed, particularly in light of [victims’] experience of participation to date’ [*Banda & Jerbo*, ICC-02/05-03/09-164-RED, *supra* note 22, para 13.

³⁹ REDRESS discussion with intermediaries from DRC.

⁴⁰ The form only asked the applicant victim whether he/she has any objections to having one single lawyer representing the entirety of the victim population and to indicate which criteria should be taken into account in the selection of a legal representative.

⁴¹ REDRESS November 2014 Seminar.

⁴² While this was done within the context of an appointment of CLRV under Rule 90(3), the Registry in the *Katanga* case stressed that it was essential that victims be consulted regarding their choice of common legal representative. As a result, it appointed a CLRV temporarily at first and only confirmed the appointment after the majority of victims had been consulted and confirmed they had no objection to the choice made by the Registrar. *Katanga & Ngudjolo*, ‘Désignation provisoire de Me Fidel Nsita Luvengika comme représentant légal commun du groupe principal de victimes’ ICC-01/04-01/07-1380, 14 August 2009; *Katanga & Ngudjolo*, ‘Désignation définitive de Me Fidel Nsita Luvengika comme représentant légal commun du groupe principal de victimes et affectation des victimes aux différentes équipes’, ICC-01/04-01/07-1488, 22 September 2009.

⁴³ For example, staff of the STL Registry took part in some of the interviews. Representatives from the Office of Public Counsel for Victims can also be present during the interviews. REDRESS November 2014 Seminar.

⁴⁴ Avocats sans Frontières, *Modes of participation and legal representation*, November 2013, at 27, available at http://www.asf.be/wp-content/uploads/2013/11/ASF_IJ_Modes-of-participation-and-legal-representation.pdf.

⁴⁵ Discussion with participants during the REDRESS November 2014 Seminar.

Jerbo, former legal representatives of victims Sir Geoffrey Nice QC and Rodney Dixon QC submitted that:

The victims are concerned that the Registry has excluded their lawyers on account of false allegations that they represent the Government of Sudan. They ask that if this is the reason behind the Registry's decision, it should be made public so that the victims and the Legal Representatives have a fair opportunity to respond and to show it to be untrue.⁴⁶

Some intermediaries have raised concerns that it may not be clear to victims that the input they give in discussions with Court officials when filling out their applications to participate in the proceedings will in turn be used to select a counsel on their behalf or what the implications of their answers will ultimately have for their representation. For example, victims applicants in the *Ntaganda* case were asked whether they had any objections to being represented by a single LRV without adequate information as to what that question entailed, in that case having the same counsel represent various ethnicities, etc.⁴⁷

While there are inherent limitations to involving large numbers of victims in the direct selection of a common legal representative, REDRESS submits that more could be done to involve victims and to ensure that they understand the process. As one intermediary stressed 'there are ways to consult victims through intermediaries or focal points that should be explored.'⁴⁸ He also underlined that victims understood the limitations faced by the Court and that these should not be used to justify a complete failure to involve them.⁴⁹ As one former LRV puts it 'while victims may not be part of the decision, they should be part of the process.'⁵⁰

The provision of 'information on qualified counsel' at an earlier stage could also be explored further.⁵¹ For example, one could envision a process whereby when a case is opened the Registry seeks expressions of interest from lawyers on the List of Counsel, reviews their profiles and shares that information with victims who apply to participate. Another scenario could see victims being asked to designate representatives from among themselves (or a trusted intermediary) who would in turn be involved more directly in the selection process.

⁴⁶ *Banda & Jerbo*, 'Request of Victims a/1646/10 and 1/1647/10 for the Trial Chamber to Review the Registry's "Notification of Appointment of Common Legal Representatives of Victims"' in accordance with Regulation 79(3)', ICC-02/05-03/09-228, 30 September 2011, para. 44.

⁴⁷ *Avocats sans Frontieres, Modes of participation and legal representation, supra* note 44, at 12.

⁴⁸ REDRESS November 2014 Seminar.

⁴⁹ One intermediary stressed that: 'victims would be able to easily understand if the Court were to state that due to resources and availability the Court may not be able to come back regularly but that they are able to designate focal points instead.' *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Some suggested that this could start as soon as an arrest warrant is issued. REDRESS November 2014 Seminar.

II.5 Problematic use of Regulation 80

Some Chambers have appointed counsel directly under Regulation 80 of the Regulations of the Court, bypassing the process envisaged in Rule 90 altogether. Such appointments were made for example in the *Ruto and Sang* case,⁵² the *Kenyatta et al* case as well as in the *Gbagbo* case.

II.5.1 The (lack of) definition of the interest of justice

Regulation 80(1) provides that ‘where the interests of justice so require’ a Chamber may on its own motion, appoint a legal representative, including counsel from the OPCV, following consultation with the Registrar.⁵³ It is left to the discretion of judges to define what is understood by ‘interests of justice’ and therefore in which circumstances the Chamber should take over the appointment of counsel. Resort to Regulation 80(1) has important consequences, considering that when the appointment is made under Regulation 80, judges have determined that victims are unable to seek a review. Though, it is questionable whether judge-made Regulations should have the authority to remove a right of review that is otherwise available to victims under the Statute and Rules of Procedure and Evidence.

A careful review of the decisions appointing counsel under this provision fails to show a consistent interpretation by the various chambers of the circumstances which warrant resort to Regulation 80(1) or how the ‘interests of justice’ is to be understood. Time constraints and the need to ensure the effectiveness of the proceedings have both been advanced but, in some instances, no reason is provided at all.⁵⁴ In *Gbagbo*, the Single Judge equated the interests of justice with the need to ensure the timely appointment of counsel: two weeks before the confirmation of charges hearing was due to start, she appointed counsel from the OPCV as common legal representative under Regulation 80 rather than the candidate recommended by the Registry under Rule 90(3), holding that:

In light of the short time remaining until the scheduled date for the confirmation hearing consideration should be given to the possibility of asking the Office of Public Counsel for Victims to act on behalf of victims, pursuant to Regulation 113 (2) of the Regulations of the Registry and Regulation 80 (2) of the Regulations.⁵⁵

A closer look at the timeline leading to this appointment raises concerns. Following the announcement that the confirmation of charges hearing would start on 18 June 2012, it took four months before the Registry was requested by the Single Judge to ‘consult with the applicants as to their wishes with regard to legal representation, [...] to identify potential common legal representatives and to provide recommendations to the Chamber.’ The Registry made a recommendation within the timeframe set by the Chamber. However it took another three weeks for the decision appointing counsel to be rendered in which reasons of timeliness were given to disregard the Registry’s proposal.

While timeliness might possibly justify an appointment under Regulation 80, Chambers have a responsibility to ensure that the process launching the appointment of a common legal representative is itself undertaken in a timely fashion. In that regard, we recommend that when common legal representation is deemed to be necessary, judges direct the Registry to assist victims with identifying counsel as early as possible. This would obviate the need for a Regulation 80

⁵² *Ruto & Sang*, ‘Decision on victims’ representation and participation’, ICC-01/09-01/11-460, Trial Chamber V, 3 Oct. 2012.

⁵³ Regulation 80(1) Regulations of the Court: ‘A Chamber, following consultation with the Registrar and, when appropriate, after hearing from the victim or victims concerned, may appoint a legal representative of victims where the interests of justice so require. The Chamber may appoint counsel from the Office of Public Counsel for Victims as defined in regulation 81, sub-regulation 3.’

⁵⁴ *Ruto & Sang*, ICC-01/09-01/11-460, *supra* note 52.

⁵⁵ *Gbagbo*, ICC-02/11-01/11-138, *supra* note 1, para 42.

approach (which we believe should be resorted to only on an exceptional basis if at all) on the sole basis of timeliness.

Other Chambers have appointed counsel under Regulation 80 without either indicating the reason for doing so, or in some instances, without referring to Regulation 80 at all. For example, it only became clear that one counsel had been appointed under Regulation 80 at the Pre-trial stage of the *Ruto* case when some victims attempted to challenge that appointment. In her decision rejecting the victims' request to challenge, the Single Judge explained that:

Contrary to the procedure foreseen in regulation 79(3) of the Regulations, in the 5 August 2011 Decision the Single Judge decided to appoint Ms. Chana as common legal representative of the 327 admitted victims pursuant to regulation 80(1) of the Regulations.⁵⁶

However, Regulation 80 is not mentioned in the earlier decision appointing this counsel.

Later, Trial Chamber V, when appointing a new common legal representative for the trial phase of the *Ruto* case only indicated that 'the Common Legal Representative will be appointed by the Chamber in accordance with Rule 90 of the Rules and Regulation 80 of the Regulations' and proceeded to direct the Registry to submit a recommendation for the position of Common Legal Representative.⁵⁷ No reasoning was provided for privileging Regulation 80 over Rule 90(3).

Decisions on legal representation directly impact the interests of victims (as is recognised by Regulation 80). As a result, Regulation 80(1) specifies that an appointment can be made '... when appropriate, after hearing from the victim or victims concerned.' In practice, such appointments have not been preceded by hearing from the victims concerned. Also, appointments under Regulation 80(1) should be adequately reasoned to allow victims to understand why and how counsel was chosen for them.

II.5.2 No possibility to seek a review of appointments under Regulation 80

While victims are able to challenge an appointment by the Registry under Rule 90(3), there is no review or appeal mechanism when the appointment is made by judges under Regulation 80. In her 9 September 2011 Decision which followed her appointment of counsel pursuant to Regulation 80,⁵⁸ the Single Judge of Pre-Trial Chamber II explained that:

As regards to what the Applicants inconsistently refer to as "right to appeal", "possibility of appeal or redress" or "possibility [...] to seek revision" under regulation 79(3) of the Regulations, ... it is the view of the Single Judge that no possibility of seeking review of the Registrar's decision under regulation 79(3) of the Regulations was possible, since no decision pursuant to that regulation was taken by the Registrar. Consequently, there has been no violation of the right to seek revision and the right to representation pursuant to regulation 79(3) of the Regulations.⁵⁹

As explained by Haslam and Edmunds, this creates inequalities between victims based on the legal basis of the appointment and also 'opens up an avenue for some appointments to be insulated from

⁵⁶ *Ruto, Kosgey & Sang*, 'Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims', ICC-01/09-01/11-330, Pre-Trial Chamber II, 9 Sept. 2011, para 14.

⁵⁷ *Ruto & Sang*, ICC-01/09-01/11-460, *supra* note 52, para 61.

⁵⁸ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-249, *supra* note 4.

⁵⁹ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-330, *supra* note 56, para 13.

challenge.⁶⁰ Some counsel have stressed that the impossibility for victims to seek a challenge of Regulation 80 appointments was ‘wrong and not logical’ and stated that any decision by the Court which directly affects victims ought to be open to challenge by victims ‘to show them that they have a real say, that they can be heard.’⁶¹

II.6 Practical Challenges with Counsel Appointments

In addition to the fundamental problems already exposed, a number of further issues have arisen in practice, which are described below.

II.6.1 Lack of transparency in the criteria applied to select counsel

When counsel is selected by Chambers or the Registry, it is important that clear criteria be used to ensure that the selection process is transparent. In the selection of a CLRV, there is an obligation to:

- (i) ensure that the distinct interests of the victims are represented;⁶²
- (ii) ensure that any conflict of interest is avoided;⁶³
- (iii) take into consideration the views of the victims;⁶⁴ and
- (iv) take into account the need to respect local traditions and to assist specific groups of victims.⁶⁵

The Registry has over time developed a set of general basic criteria that it applies when directed by a Chamber to select a counsel ‘based on the jurisprudence of the Court as well as the Registry’s experiences to date in assisting victims to select legal representatives and organizing common legal representation.’⁶⁶ These include:

- Pre-established relationship of trust with victims eligible to participate in the case, or factors demonstrating a capacity for such a relationship;
- Experience working with victims or other vulnerable persons;
- Familiarity/connection with the situation country;
- Particular expertise in international criminal law and/or relevant litigation experience, preferably in international criminal proceedings or proceedings involving large groups of victims;
- Sufficient availability;
- Information technology skills.⁶⁷

As far as we are aware, these criteria have only been described in Registry filings, in the *Banda and Jerbo* case and in the Kenya cases, and only in annexes submitted *after* counsel had been selected. There is no public policy document, easily accessible to victims and intermediaries, that clearly spells out these criteria or the different weight applied to the different factors. Nor is there any clear relationship between the criteria and victims’ expressed wishes.

⁶⁰ Emily Haslam & Rod Edmunds, ‘Common Legal Representation at the International Criminal Court: More Symbolic than Real?’, (2012) 12 (5) *International Criminal Law Review* 871, at 879.

⁶¹ REDRESS November 2014 Seminar.

⁶² Rule 90(4) makes reference to the safety, physical and psychological well-being, dignity and privacy of victims (and witnesses) and to relevant factors such as age, gender, health, nature of crimes.

⁶³ *Ibid.*

⁶⁴ Regulation 79(2) Regulations of the Court.

⁶⁵ *Ibid.*

⁶⁶ *Banda & Jerbo*, ‘Annex: Registry’s proposed general criteria for selection of common legal representatives under rule 90(3) of the Rules of Procedure and Evidence’, ICC-02/05-03/09-164-Anx, 22 June 2009, para 1.

⁶⁷ *Ruto & Sang*, ‘Information document distributed to counsel on 17 June 2011’, ICC-01/09-01/11-243-Anx4, 1 August 2011.

The Trial Chamber in the *Lubanga case* held that ‘considerations such as the language spoken by the victims (and any proposed representative), links between them provided by time, place and circumstance and the specific crimes of which they are alleged to be victims will all be potentially of relevance.’⁶⁸ In the Kenya cases, Pre-Trial Chamber II indicated that continuity of legal representation was not *per se* a determinative factor in the choice of a legal representative;⁶⁹ this led to the appointment of new counsel. When the cases moved to trial, counsel was again replaced following the decision by the majority of Trial Chamber V that an essential criterion would be the ability of counsel to be based in Kenya. In that case, Judge Eboe Osuji dissented stating that in his view, ‘that factor of longstanding familiarity with the case was not given its due weight in the decision of the Chamber, given the availability and continuing interest of the long-serving victims’ counsel’ who had represented victims at the Pre-trial stage.⁷⁰

II.6.2 Change of counsel throughout the proceedings

VPRS has stressed that they try to avoid changes in legal representation wherever possible. However, this has not always been possible. As explained earlier, counsel may change when a number of counsel represent victims and a decision is made by Chambers to appoint a CLRV. Extraordinary circumstances may also necessitate a change as was the case in *Bemba*: one of the two CLRVs appointed to represent victims died during the trial proceedings and the other CLRV was thus appointed to represent the other CLRV’s clients for the remaining part of the proceedings.

However, there have been other instances where counsel was replaced for reasons that are not clear to the outside observer and have not been understood by participating victims. This was the case in the Kenya cases as described earlier where counsel was replaced twice throughout the proceedings. In the absence of wrongdoing by the previously appointed legal representatives and considering victims were not consulted on whether for the purpose of trial proceedings, they would prefer a counsel based in Kenya, the appointment, for the second time, of a new lawyer to represent them is problematic. As was expressed by one counsel:

Without a trust relationship you will not have a victim coming to you and providing [his/her] views and concerns. [...] It's very disturbing to interrupt the trust relationship once it has been created [...] it's disturbing for the proceedings, but more importantly it's disturbing for the victims who have to adapt to new ways of working, to a new person... [T]his can cause possible further victimisation.⁷¹

Intermediaries working with victims in Kenya have also stressed that the change in legal representation prompted victims to question the credibility of their previous lawyer and also the credibility of the case itself. Victims were confused at the change and unclear as to the reasons underpinning it.⁷² As explained by one intermediary from Kenya:

The biggest nightmare was getting victims to understand why the Court had changed the legal representation at that particular point. There was absolutely nothing that was told to the victims. [They started] to question the credibility of the [former] lawyer [but also to question] the use of participation in [the] case.⁷³

⁶⁸ *Lubanga*, ICC-01/04-01/06-1119, *supra* note 5, paras. 124-126.

⁶⁹ *Ruto, Kosgey & Sang*, ICC-01/09-01/11-249, *supra* note 4, para 67.

⁷⁰ *Ruto & Sang*, ‘Decision appointing a common legal representative of victims- Dissenting Opinion Of Judge Eboe-Osuji’, ICC-01/09-01/11-479, Trial Chamber V, 23 November 2012.

⁷¹ Comment expressed by participant during the REDRESS November 2014 Seminar.

⁷² *Ibid.*

⁷³ *Ibid.*

Furthermore, some have informally expressed concerns that the change of counsel may have been prompted by dissatisfaction at the former counsel's repeated attempts at obtaining additional resources to undertake their functions.⁷⁴ Due to the opacity of the recruitment process such (mis)perceptions were heightened.⁷⁵ Similar concerns were expressed in relation to the change of counsel in the *Banda and Jerbo* case.⁷⁶

While it is understandable that under the ICC legal framework judges have to strike a balance between victims' views and the effectiveness of proceedings, both victims and lawyers should be consulted before such changes are implemented. In addition, the needs and views of victims ought to be given appropriate consideration. Change of counsel mid proceedings should be exceptional in light of the consequence it can have.

In addition, lawyers have had difficulties with managing victims' expectations when the duration of their mandate is subject to changes independent of their will. These changes in legal representation may also have an impact on counsel's powers of attorney and the overall ethical framework governing all legal representation work. The appointment of counsel should be done for the whole duration of a case to ensure that, in the absence of clear evidence of wrongdoing, victims benefit from continuous representation throughout the proceedings.⁷⁷

Finally, victims have not always been adequately informed when a new counsel has been appointed. Intermediaries have stressed that the appointment of OPCV as common legal representative in the *Ble Goude* case came as a shock for some victims and those working with them who only learnt of the appointment when watching the proceedings on television.⁷⁸ Similar concerns were expressed in relation to the appointment of OPCV as common legal representative for the confirmation of charges proceedings in the *Ntaganda* case.⁷⁹ VPRS has recognised the need to follow up with victims once a new counsel is appointed to enable the new lawyer to interact with victims and to make introductions.⁸⁰ REDRESS encourages the Registry to commit to systematically and promptly informing victims of any change to their legal representation.

II.6.3 Victims' limited ability to challenge counsel appointments

The ICC legal framework only provides limited opportunities for victims to challenge counsel appointments. As previously mentioned, no review is possible when the appointment of counsel is made by Judges pursuant to Regulation 80. However, when the Registrar chooses a CLRV pursuant to Rule 90(3), victims may request the relevant Chamber to review the Registrar's decision within 30 days of being notified of that decision.⁸¹ However, the ICC jurisprudence has interpreted this to be a limited review. The Chamber's review is limited to ascertaining 'whether the Registry has taken "all reasonable steps to ensure that the distinct interests of the victims are represented and any conflict of interest is avoided"', bearing in mind the effectiveness of the proceedings and of the legal representation of all victims in [the] case.⁸²

⁷⁴ Such concerns have been raised informally with REDRESS staff.

⁷⁵ Discussion with one representative from civil society. When such concerns were discussed with ICC officials, they expressed their surprise and unawareness that such a perception had arisen and stressed that the Registry entity in charge of allocating resources was different from the one overseeing the recruitment of counsel.

⁷⁶ One lawyer explained that 'victims had a lot of problems to understand [the change in legal representation] and wondered: was the previous counsel not good enough? Did he commit any wrongdoing?' He added that as a result some victims considered withdrawing from the proceedings. REDRESS November 2014 Seminar.

⁷⁷ This is for example the case before the Special Tribunal for Lebanon.

⁷⁸ REDRESS November 2014 Seminar.

⁷⁹ Discussions between REDRESS and intermediaries in Eastern DRC.

⁸⁰ REDRESS November 2014 Seminar.

⁸¹ Regulation 79(3) Regulations of the Court.

⁸² *Banda & Jerbo*, ICC-02/05-03/09-337, *supra* note 1, para. 15; This reflects the requirement under Rule 90(4) that: 'The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.'

The jurisprudence has narrowly construed the nature of the review, despite the express recognition in Rule 90 that victims' choice should be the rule. We believe that victims should be able to seek a review of both the *process* which led to the appointment, the *criteria* used to make that choice as well as the ultimate *choice* made by the Registry as to the specific counsel to be appointed. As expressed by one lawyer:

It's about showing the victims that they do have a real say, that they can be heard. And even if in the end the challenges are denied, [...] if you get your opportunity to make your argument or you think it's been listened to and dealt with fairly, you'll accept the outcome more readily than if you are just pushed away at first blush. [...] That's an important part of the justice process...that [would] make a big difference in building confidence in the procedure.⁸³

In addition to the narrow construction of the nature of the review, intermediaries have indicated that victims are not adequately made aware of the possibility to challenge the appointment of counsel.⁸⁴ They have called for VPRS to include that information when interacting with victims and to explain to victims precisely how they can seek a review. Registry officials have also stressed the difficulty to ascertain whether requests for a review genuinely emanate from dissatisfied victims or are instead, an attempt by counsel who have not been selected to retain their mandate;⁸⁵ though this would be for the reviewing Chamber to ascertain and should not be used as a rationale to bar access to a review process.

Some participants in the November seminar suggested that the ICC explore developing a review framework similar to what is in place at the Special Tribunal for Lebanon (STL).⁸⁶ There, a victim who disagrees with the Registrar's designation of common legal representative can seek a review before the Pre-Trial Judge. However, victims are provided with a duty counsel to seek such a review in order to ensure that the proceedings remain neutral and objective.⁸⁷ The Registrar cannot designate as duty counsel any legal representative who has previously represented or expressed an interest in representing the victims participating in the proceedings who are seeking the review. During the review 'no submissions, views or concerns shall be presented by any legal representative who, prior to the Registrar's designation under Article 16 represented or expressed an interest in representing the victims participating in the proceedings who are seeking the review.'⁸⁸ When one victim objected to being represented by one of the co-counsel appointed by the Registrar and asked for a review, officials from the STL explained that the appointment of a duty lawyer enabled 'the tribunal [to] really see clearly, and there was no doubt that the claim was genuine.' Ultimately the appointment was upheld, though the views of the victim were still considered and it was agreed she/he would not have to communicate directly with that particular counsel.⁸⁹

With regard to who could play the role of duty counsel in similar proceedings before the ICC, some counsel consulted have suggested that the Office of Public Counsel for Victims would be well placed.⁹⁰ However, OPCV can be appointed as CLRV and therefore can be one of the counsel targeted by a challenge brought against its appointment. In such instances, a 'duty counsel' could be drawn from the list of counsel.

⁸³ REDRESS November 2014 Seminar.

⁸⁴ REDRESS November 2014 Seminar.

⁸⁵ Ibid.

⁸⁶ Under the STL framework, victims do not have the choice of their own counsel. Legal representatives are appointed by the Registrar on the basis of a specific list of qualified victims counsel drawn by the STL.

⁸⁷ STL, 'Directive On Victims' Legal Representation', STL-BD-2012-04-Rev.1, adopted on 4 May 2012 and amended on 28 October 2013, Article 18. (Hereinafter STL Victims Directive)

⁸⁸ Art. 22 STL Victims Directive.

⁸⁹ REDRESS November 2014 Seminar.

⁹⁰ Ibid, and interviews with counsel.

In *Banda and Jerbo*, two Darfuri victims sought a review of the appointment made by the Registry of two CLRVs. They advanced that they had distinct interests from the other victims participating in the case, which prevented representation by the appointed CLRVs, but also that the appointment was vitiated due to the fact that they had never been directly consulted prior to the Registry taking its decision.⁹¹ The Chamber first considered whether the interests of the Darfuri victims were significantly distinct from the ones of the other victims to the extent that this would warrant a separate legal representation and ruled that the ‘distinct interests of individuals who have been granted the victim status in this case [were] represented’ adequately. It then turned to an evaluation of whether a conflict of interest existed that would justify separate representation. Here as well it found in the negative recalling that:

in case the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the Chamber immediately, who will take appropriate measures.⁹²

The Chamber then proceeded to analyse the victims’ submission that they ought to have been consulted directly. It found that absence of ‘direct’ consultation with the victims was not prejudicial to the two victims as their views were largely conveyed through their legal representatives throughout a five month consultation process organised by the Registry.

⁹¹ *Banda & Jerbo*, ‘Annex 1 Request of Victims a/1646/10 and 1/1647/10 for the Trial Chamber to Review the Registry’s “Notification of Appointment of Common Legal Representatives of Victims” in accordance with Regulation 79(3)’, ICC-02/05-03/09-228-Anx1-Red, 30 September 2011.

⁹² *Banda & Jerbo*, ICC-02/05-03/09-337, *supra* note 1, para 42.

III. Ensuring Quality and Effective Representation

There has been some suggestion that in a number of instances the quality of victims' representation may not have been adequate in cases before the ICC.⁹³ However, the quality of representation can be difficult to assess objectively, given the absence of a framework defining the role and tasks specific to the legal representation of victims. Equally, it is difficult to attribute fault, given the practical challenges such lawyers face, the enormity of their tasks, a difficult operating environment and often inadequate financial and personnel resources. There is also a real question as to who (aside from the clients) is best placed to assess counsel performance, on what basis and with what repercussions. There are discussions on whether it would be appropriate to set up a new mechanism to monitor the quality of victims' legal representation.

III.1 Obligations of Victims' Legal Representatives and Challenges to Meet Them

The ICC Code of Conduct sets out the general obligations of all counsel, which includes victims' legal representatives and CLRV.⁹⁴ These include the need to provide clients with all explanations reasonably needed to make decisions regarding his or her representation.⁹⁵ Communicating with victims is also part and parcel of Counsel's duty to consult with victims in relation to the objectives of their representation and how such objectives should be achieved. The need for adequate communication between counsel and clients has also been underscored by chambers.⁹⁶ Chambers have also stressed the need for counsel to ensure that participation is as meaningful as possible;⁹⁷ to present 'the genuine perspective of the victims.'⁹⁸

Some counsel have struggled to communicate effectively and with sufficient frequency with their clients. Some victims have expressed dissatisfaction at the level of contact they have with their counsel⁹⁹ or have not felt that they were consulted and informed enough.¹⁰⁰ REDRESS is particularly concerned at reports that some victims have never met with their lawyer.¹⁰¹ But it is difficult to situate blame. Sometimes the reasons will be beyond counsel's control: practical challenges to consult large numbers of victims, inadequate resources and/or support in the field.

There are also challenges associated with assisting victims who have suffered serious trauma. For counsel coming from other countries or regions, there will be the further challenges to become

⁹³ REDRESS discussions with victims and intermediaries in DRC, Uganda and Ivory and Coast, with VPRS officials as well as other ICC Officials within the Registry and Chambers.

⁹⁴ ICC, *Code of Professional Conduct for Counsel*, ICC-ASP/4/Res.1, adopted 2 December 2005 (hereinafter ICC Code of Conduct). It sets out general obligations such as acting honourably, independently and freely; being respectful and courteous in his or her relations with victims and others; maintaining a high level of competence in the law applicable before the Court and respecting and actively exercising all care to ensure respect for professional secrecy and the confidentiality of information. The Code further specifies that counsels shall not engage in any discriminatory conduct in their relationship with their clients nor engage in any improper conduct. They also shall take into account the clients' personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled. The ICC Code of Conduct also makes provision for building trust with clients, communicating with clients and avoiding conflict of interests.

⁹⁵ Article 15 ICC Code of Conduct.

⁹⁶ *Katanga & Ngudjolo*, ICC-01/04-01/07-1328, *supra* note 1, para 10(a).

⁹⁷ *Ibid*, para. 10. See also, *Bemba*, ICC-01/05-01/08-1005, *supra* note 4, para. 9; *Katanga & Ngudjolo*, 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case', ICC-01/04-01/07-474 Pre-Trial Chamber I, 13 May 2008, paras 156-157.

⁹⁸ *Katanga & Ngudjolo*, ICC-01/04-01/07-1328, *supra* note 1, para 15.

⁹⁹ This was mentioned in discussions with partners in DRC and Uganda.

¹⁰⁰ Some even reported never meeting with their counsel, or remaining years without direct contact. Discussions with local victims groups in DRC. See also, *Avocats sans Frontieres, Modes of participation and legal representation*, *supra* note 44, at 32.

¹⁰¹ This was mentioned by one participant during the REDRESS November 2014 Seminar. It was also raised by victims and intermediaries REDRESS has worked with in the context of its field work.

familiar with the local context, culture and traditions all of which may impact communications and the ability to receive instructions. But the most critical challenge is the large numbers of victims that any CLRV may be called upon to represent.

In many of the cases before the Court, LRVs have been called upon to represent very large numbers of victims. In the *Bemba case*, over 5000 victims are participating in the trial, represented by two CLRV. Counsel are also often based far from those they represent, even when they reside in the same country (counsel based in Kinshasa or Nairobi may not be much more accessible to their clients than counsel based in The Hague considering constraints to travel within DRC and Kenya).¹⁰² This can limit the ability of counsel to meet and consult with victims.¹⁰³ In the *Kenyatta case*, when the Pre Trial Chamber requested the CLRV to seek instructions from participating victims on whether their identity could be disclosed to the defense,¹⁰⁴ it took almost six months for the consultations to be conducted, mostly due to the challenge of identifying victims and organizing consultations on such a large scale.¹⁰⁵

The Court's jurisprudence has recognized that counsel funded by the legal aid system of the Court should be provided with a support structure that allows them to:

- respond to a reasonable number of specific legal inquiries from individual victims;
- receive general guidelines or instructions from their clients as a group and particular requests from individual victims;
- maintain up to date files of all participating victims and their whereabouts;
- obtain qualified legal support on a need basis;
- store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner;
- Communicate with victims in a language they understand.¹⁰⁶

But, counsel have seized Chambers on numerous occasions to stress that they were not in position to adequately consult with their clients due to resource or time constraints.¹⁰⁷ For example, in *Katanga*, ahead of the closing arguments in the trial, one legal representative of victims requested additional resources in order to travel to DRC to inform his clients of developments and collect their instructions regarding final arguments and meet them individually to get precisions. The Registry rejected the request stating that a single Legal Assistant in the field would suffice and the Chamber confirmed that 'personal contact with victims was unnecessary for the purposes of the mission'.¹⁰⁸ But according to *Avocats Sans Frontieres*, some of the victims refused to have strategic discussions with assistant counsel in the field and instead requested to speak with the lead counsel.¹⁰⁹ Counsel practicing before the ICC as well as independent experts have also indicated that in their experience, counsel 'must travel to the field at least between three and four times every year.'¹¹⁰

¹⁰² *Avocats sans Frontieres, Modes of participation and legal representation, supra note 44, at 29.*

¹⁰³ REDRESS November 2014 Seminar.

¹⁰⁴ *Muthaura, Kenyatta and Ali, 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings', ICC-01/09-02/11-267, Pre-Trial Chamber II, 26 August 2011.*

¹⁰⁵ *Muthaura, Kenyatta and Ali, 'Notification to the Chamber', ICC-01/09-02/11-381, 12 January 2012.*

¹⁰⁶ *Katanga & Ngudjolo, ICC-01/04-01/07-1328, supra note 1, para. 17; Bemba, ICC-01/05-01/08-1005, supra note 4, paras. 25-26;*

Muthaura, Kenyatta and Ali, ICC-01/09-02/11-267, supra note 104, para 92; Ruto, Kosgey & Sang, ICC-01/09-01/11-249, supra note 4.

¹⁰⁷ *Ruto & Sang, 'Urgent request by the Victims' Representative pursuant to regulation 83(4) of the Regulations', ICC-01/09-01/11-420, Trial Chamber V, 1 June 2012.*

¹⁰⁸ *Katanga, 'Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid', ICC-01/04-01/07-3277, Trial Chamber II, 23 April 2012.*

¹⁰⁹ *Avocats sans Frontieres, Modes of participation and legal representation, supra note 44, at 30.*

¹¹⁰ S.Chana and M. Anyah, 'Comments of legal representatives of victims to the Registry's discussion paper on the review of the ICC legal aid system', 31 January 2012, para 49 available at https://www.fidh.org/IMG/pdf/legal_aid_response_legal_representatives_final.pdf (last accessed 26 April 2015); An independent panel of expert on victim participation also stressed that 'At a minimum, legal representatives should meet or provide updates to their clients every four months to keep them informed of the status of the proceedings, prevent misinformation spreading, maintain engagement in the process and obtain an update on their needs, views and concerns.' Independent Panel of Experts, 'Report on victim participation at the International Criminal Court', July 2013, para 102, available at

Counsel have also raised concerns in relation to the support structure that is made available to them by the Court. One LRV indicated that in the absence of a field office, the lawyers had to work in restaurants and hotel rooms without adequate guarantees of confidentiality. Another has stressed the importance of field staff and the need to give much more credit to their role.¹¹¹

CLRVs have also stressed that Chambers often set short deadlines to file observations on issues which significantly affect victims' interests, making it often impracticable for counsel to consult with their clients.¹¹² Chambers have a responsibility to ensure that deadlines allow for legal representatives to genuinely consult with their clients ahead of filings.¹¹³

The situation just described reflects a broader issue: the absence of a clear framework for what quality or effective representation of victims before the ICC entails. This impacts on the resources that counsel should be able to request in order to deliver such representation. As expressed by a former ICC official, such a detailed framework would also allow a better evaluation of what resources the Registry makes available to counsel and whether these are sufficient.¹¹⁴ In recent years, the Registry has faced increasing pressure from States Parties to reduce the cost of legal aid, generally, and legal aid for victims in particular. However, the legal aid scheme should be designed to ensure effective representation and sufficient resources ought to be allocated to ensure this can be achieved.

III.2 Lessons Learned, Sharing of Expertise and Training

The difficulties faced by counsel are significant. However, there is still scope for them to devise better structures within their legal representation team to better keep in contact with their clients,¹¹⁵ learning from some of the more positive experiences. For example, one counsel explained that he had not met many challenges in taking instructions from clients despite their remote location and was constantly in touch during hearings with his field assistants who in turn were giving him real-time instructions.¹¹⁶ The same counsel also stressed that while his clients were living in remote parts of DRC, some of them were still able to send him emails and to call him. Intermediaries have also stressed that counsel could make better use of information technologies. With regards to informing victims about developments in the proceedings, OPCV, when acting as CLRV, has developed a practice of preparing information sheets shared with their clients in order to clarify and explain ongoing proceedings.¹¹⁷ At the STL, one counsel explained that he and his team set up a series of communication systems including a secure website that all victims can access with a password, which is updated daily and translated into Arabic. They also send newsletters. They have free phone numbers that victims can call to contact them at no costs and 'whatsapp' contact points. They also bring victims to The Hague and hold town hall style meetings in Beirut as well as meetings with individual victims.¹¹⁸ These are but a few positive examples.

<http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (hereinafter Independent Panel of Experts Report).

¹¹¹ One counsel explained that despite them being 'absolutely vital for me in getting my job done,' their work was not sufficiently recognised and that the Court should consider providing them with adequate, full time, work contracts to reflect their involvement throughout the whole duration of a case.

¹¹² Discussions between REDRESS and counsel.

¹¹³ REDRESS, *The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future*, 2012, at 20-21, available at http://www.redress.org/downloads/publications/121030participation_report.pdf.

¹¹⁴ REDRESS November 2014 Seminar.

¹¹⁵ See also FIDH, *Recommendations to the Eighth Session of the Assembly of States Parties to the Rome Statute*, November 2009, 9, available at <https://www.fidh.org/IMG/pdf/ASP532ang.pdf>.

¹¹⁶ REDRESS November 2014 Seminar.

¹¹⁷ Interview with counsel from the OPCV.

¹¹⁸ REDRESS November 2014 Seminar.

The Registry could organise experience-sharing sessions for counsel representing victims, which could include counsel representing victims before the ECCC and the STL, where similar challenges exist. Lawyers should also receive training. Regulation 140 of the Regulations of the Registry provides that the Registrar shall, among other things, provide access to a case law database, provide training materials, and comprehensive information on the Court.¹¹⁹ However, there is a need for more specialised support and training on the particularities of representing victims before the ICC, including, modalities to represent large numbers of victims, how to question vulnerable victims, ways of providing a supportive environment for people who are particularly vulnerable, safety and security issues.¹²⁰

III.3 Defining effective representation

The ICC does not differentiate between the representation of victims and accused persons, with regards to being admitted to its List of practicing counsel.¹²¹ All counsel must have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.¹²² They have to possess excellent knowledge of at least one of the working languages of the Court,¹²³ ten years of relevant experience¹²⁴ and must not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.¹²⁵

Similarly, under the Code of Conduct for counsel practicing before the ICC, victims' counsel have the same obligations as counsel for the defence. The provisions in the Code seem to have been drafted with Defence Counsel in mind;¹²⁶ little is said of the particularities of representing victims, different to or over and above what may apply to counsel for the defence.

But, the role of LRVs is quite different to that of defence counsel and these differences are magnified when LRVs represent hundreds if not thousands of victims. Yet, many counsel appointed to represent victims at the ICC may have little experience of representing large numbers of clients spread over wide distances and may need guidance as to what their appointment as LRV or CLRV entails. This has led some counsel to call on the Court to help design a policy or standards on what effective representation entails. Such standards are important for transparency purposes and also because 'it makes it clear to counsel and it makes it clear to the clients what is expected in this relationship.'¹²⁷ While some counsel have expressed reservations about further regulating their practice, those in favour of a policy have stressed that the Code of Conduct ought to at least be reviewed to also tailor for the specific conduct that should be expected from LRVs.

The setting out of specific outcomes applicable to legal representation already exists in some domestic frameworks and the ICC could consider some of these models. For example, the UK's Solicitors Regulation Authority Code of Conduct contains mandatory "outcomes" and non-mandatory "indicative behaviours" and the commentary to the Canadian Bar Association Code of Conduct

¹¹⁹ Regulation 140, Regulations of the Registry.

¹²⁰ This is done at the STL where training programmes that run over several days are organised for victims' legal representatives. REDRESS November 2014 Seminar. See also, *Avocats sans Frontières, Modes of participation and legal representation*, supra note 44, at 13.

¹²¹ Rules 90(6) and 22(1) of the Rules of Procedure and Evidence (RPE).

¹²² Rule 22(1) RPE.

¹²³ Ibid.

¹²⁴ Regulation 67(1) of the Regulations of the Court.

¹²⁵ Regulation 67(2) of the Regulations of the Court.

¹²⁶ REDRESS November 2014 Seminar.

¹²⁷ Comment expressed by counsel during the REDRESS November 2014 Seminar.

provides non-exhaustive examples of conduct that fails to meet the minimum quality level required.¹²⁸ Similarly, the STL has established a separate and detailed framework in relation to victim representation. A Victims' Directive sets out in detail what LRVs are expected to do, and sets a separate process for counsel to be included in a list of counsel specific to the representation of victims.¹²⁹ The STL replaced its Code of Conduct for Counsel in December 2012 and incorporated specific provisions applicable to legal representatives for victims.¹³⁰ An 'effective representation regime' with separate elements for defence and victims counsel is set out, subject to a specific complaint and formal monitoring process.¹³¹ Representation is deemed ineffective 'where one or several acts or omissions of Counsel or of a member of the Legal Team, materially compromise, or might irreparably compromise, the fundamental interests or rights of the Client.' The STL Code also sets out specific criteria that the Chief of the Victims' Participation Unit can use to assess whether representation has been ineffective: attendance at Court,¹³² motion practice,¹³³ knowledge of the law,¹³⁴ knowledge of the facts relevant to the case,¹³⁵ development of the theory of the case,¹³⁶ scrutiny of the prosecution case,¹³⁷ investigations, examination of witnesses, management of staff, case management, and communication with the client.

The Registry together with the counsel community should consider setting out a more detailed framework to explain the specific tasks and obligations of LRVs and CLRVs. This could include amending the Code of Conduct to reflect the specific obligations and standards applicable to those counsel and/or designing specific guidelines.¹³⁸ The proposal by the Registrar to establish an ICC Association of Counsel could also be an appropriate forum for the development of such a framework. While one would want to avoid a two-tiered system or second-class representation for victims,¹³⁹ the ICC could also consider setting up a separate list of counsel for victims, which might include certain different and/or additional requirements to allow for counsels' inscription. For example, significant experience representing victims in complex civil proceedings may be more relevant than experience in criminal law and procedure with regards to representing large numbers of victims in proceedings and reparation proceedings in particular. At present, lawyers with such expertise are not eligible to join the list of counsel unless they have the requisite years of criminal law practise.

Victims may have different views on what effective and meaningful participation means to them. One counsel explained that 'LRV are more than lawyers, they are social workers, confessors etc.'¹⁴⁰ In the course of representing victims of international crimes, LRVs are likely to have to address some of

¹²⁸ United Kingdom, Version 8: SRA Code of Conduct 2011, 16 September 2011, last amended on 1 October 2013, outcomes 1.1-1.5, 1.7, 1.16, 2.1-2.5, 4.1-4.5; Canadian Bar Association, Code of Professional Conduct (Canadian Bar Association, 2009), chapters I, II, III, VIII, XIX, XXII. One counsel practicing in the UK explained that: 'There is a big emphasis on providing information to clients. So what is drummed into us as solicitors from the first day that we are trained is providing information at the outset of a case in what we generally call a client care letter or a retainer, which sets out the scope of the instructions, the time frame for the case, the possible outcomes, the level of contact and service that you're likely to have, and the way the case is funded; so to try and explain from the outset what is realistic.' REDRESS November 2014 Seminar.

¹²⁹ STL Victims Directive.

¹³⁰ Art 9, *Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon*, STL/CC/2012/03, adopted 14 December 2012 (hereinafter STL Code of Conduct).

¹³¹ Standards in relation to LRVs are set out in Article 8 STL Code of Conduct for Counsel.

¹³² In particular, counsel have to work full time on the case unless permitted to do otherwise by the Registrar.

¹³³ This includes complying with deadlines for filings, conducting research for filings, and making focused and coherent written and oral submissions which are in the interests of the Client and in accordance with the strategy defined by counsel.

¹³⁴ This includes the requirement to: Identify and inform the Victims' Participation Unit of any legal issues for which the Legal Representative of Victims requires legal assistance and seek assistance accordingly.

¹³⁵ Such as: seeking the Clients' views on factual matters which may affect the interests of the Clients in respect of the case; Identifying from the outset of the proceedings any assistance or expertise that would be useful to the Victims' Team in fulfilling its task and request as soon as possible from the Victims' Participation Unit or from any other relevant external organisation any assistance or expertise required.

¹³⁶ Under that requirement counsel need to: a) Following consultation with the Clients, establish as soon as possible a theory of the case; and, (b) Decide upon and implement a strategy seeking to present this theory during trial in a coherent and effective manner.

¹³⁷ Including the need to respond to and/or supplement the Prosecution's case as necessary to uphold the interests of the Clients.

¹³⁸ An independent panel of experts recommended that such Guidelines be set up in 2013. See, Independent Panel of Experts Report, *supra* note 110, para 105.

¹³⁹ Concern expressed by one counsel during REDRESS November 2014 Seminar.

¹⁴⁰ Interview with counsel from the OPCV.

their clients' immediate needs in order for them to take part in the justice process. Intermediaries have also stressed that victims expected their lawyer to assist with social and economic issues.¹⁴¹ While not all these aspects will fall squarely within the scope of victims' legal representation the need for LRVs and CLRVs to be sensitive to these issues and to work with other types of professionals is a vital component of their job.¹⁴²

Officials from the STL Victims Unit have expressed regret that victims were not involved in the design of the STL criteria for effective representation and have suggested that should the ICC consider embarking on such a project, it could usefully consult with victims to better understand what they want from their counsel and reflect the responses in the criteria.¹⁴³

III.4 Dealing with Under-Performance and Misconduct

The Registry has suggested that a monitoring mechanism be established to assess counsel performance, in addition to what the current disciplinary framework provides. This is because allegations of 'under-performance' do not always reach the threshold to activate the disciplinary framework – requiring an alleged breach of the Code of Conduct. Yet, as already indicated, the absence of criteria on what constitutes good or adequate performance makes it difficult to assess objectively when counsel meet or fall below the mark. Thus, developing performance criteria would be an important precursor.

Thus far, the proposal to establish a new monitoring mechanism has met with mixed responses. Positively, a new mechanism could serve as a useful tool to aid or encourage counsel to improve their performance. It would also provide greater transparency and objectivity to any scrutiny of counsel already being carried out by the Registry. On a more negative note, there is concern that a new monitoring mechanism would undermine counsel's independence, and that any need for oversight is adequately addressed through the existing disciplinary process, or could be better addressed through modifications to the existing disciplinary process. There is also concern about who should carry out the monitoring.

Below, we begin with an assessment of the current disciplinary structure. Thereafter, we consider the proposals for a new monitoring mechanism.

III.4.1 The Existing disciplinary process

Under Article 31 of the Code of Conduct, a counsel commits misconduct when he or she:

- (a) Violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her;
- (b) Knowingly assists or induces another person to commit any misconduct, referred to in paragraph (a) of this article, or does so through the acts of another person; or
- (c) Fails to comply with a disciplinary decision rendered pursuant to this chapter.

Article 34 of the Code provides that allegations of misconduct can be submitted to the Registry by the relevant Chamber, the Prosecutor or '[a]ny person or group of persons whose rights or interests

¹⁴¹ REDRESS November 2014 Seminar.

¹⁴² E.g., the *UN Principles and guidelines on access to legal aid in criminal justice systems*, UNGA 67/187, adopted, 20 December 2012, recommends that 'mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e. health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.'

¹⁴³ REDRESS November 2014 Seminar.

may have been affected by the alleged misconduct.¹⁴⁴ The Registrar can also bring complaints against counsel, on his/her own initiative.¹⁴⁵

Victims, as persons whose interests are affected by the conduct of their legal representative, are entitled to bring complaints and to be notified if their complaints are dismissed by the Commissioner. However, in practice, they are often unaware of the possibility to bring a complaint and how or where to lodge it. While it should be standard practice for counsel to provide this information to clients, and it is in some domestic jurisdictions,¹⁴⁶ one external counsel explained that he had not discussed with clients what they should expect from him or the complaints procedure,¹⁴⁷ citing time pressures. Officials from the OPCV explained that while they informed their clients of the possibility to complain, they encouraged them to do so by discussing their concerns with the OPCV. At the STL, the obligation falls on the Victim Participation Unit, as soon as possible following the designation of a lead legal representative for victims, to inform victims of 'the role and obligations of their legal representative(s) and the remedies available to them should they consider that such obligations are not met.'¹⁴⁸ This requirement should be in place at the ICC for all appointed counsel.

Access to the complaints mechanism also needs to be ensured. Complaints procedures are unlikely to be effective if they are inaccessible to victims. The ICC Code of Conduct provides that complaints must be made in writing before a member of staff of the Registry, though when this is not possible, they can also be brought orally. Written procedures may not be appropriate for most victims; concerns about legal representation may arise through informal discussions between victims and Court officials and/or intermediaries. It is essential that adequate systems are set up to systematically record and keep track of complaints that are brought orally.

The handling of complaints must also be transparent. Under the Code of Conduct, the Registrar has an obligation to transmit complaints to a Commissioner, who is chosen from amongst persons with established competence in professional ethics and legal matters and appointed for four years by the Presidency. Upon receiving the complaint, the Commissioner is obliged to forward it to counsel subject to the disciplinary procedure, giving him/her 60 days to respond. However intermediaries have expressed concerns at the real or perceived lack of follow up when concerns have been brought orally to ICC officials.¹⁴⁹ There is also no clarity as to what happens when concerns are brought orally to staff of the Registry, or what threshold is required for the relevant Registry Official to trigger a formal complaint.¹⁵⁰ Under the STL regime, if the complainant is unable to file a complaint in writing, he/she can complain orally to a staff of the Victims' Participation Unit, who has an obligation to put the complaint into writing.¹⁵¹ This could be a useful approach for the ICC to adopt.

It would be helpful for the Registry to clarify how it handles complaints raised by victims or intermediaries and to promptly follow these up in writing with both counsel and the complainants.

III.4.2 The need for a new monitoring mechanism?

A system for monitoring victims' counsel was proposed as part of the process which led to the recent amendment of the Regulations of the Registry.¹⁵² The amendment was not retained however the

¹⁴⁴ Article 34 of the ICC Code of Conduct for Counsel.

¹⁴⁵ Art 34 ICC Code of Conduct for Counsel.

¹⁴⁶ UK Code of Conduct for solicitors, chapter 1: 'you and your clients.'

¹⁴⁷ REDRESS discussion with one victim legal representative.

¹⁴⁸ Art 21, STL Victims' Directive.

¹⁴⁹ REDRESS Discussion with intermediaries in DRC and Uganda.

¹⁵⁰ Intermediaries have reported to REDRESS that despite raising concerns with VPRS field staff, no formal follow up appeared to have been undertaken (or they were not aware of any follow-up).

¹⁵¹ Art 18, STL Code of Conduct.

¹⁵² Regulation 112 *bis* was proposed:

Monitoring of legal representatives of victims

Registry and in particular the VPRS, continues to consider whether and how LRVs and CLRVs could and should be monitored.¹⁵³

Monitoring would address the perceived need to ensure that the legal aid provided by the Court guarantees quality representation; there is a need to strike a balance between allowing sufficient independence and resources while ensuring accountability for the use of the Court's resources. The Registry, as the provider of legal aid to victims, has a corresponding duty to ensure the proper use of funds paid by the Court. Such a position is supported by the Special Rapporteur on the independence of judges and lawyers.¹⁵⁴ A similar position is reflected in the STL regime where the Registrar is responsible for ensuring that the representation of victims is effective, meets internationally recognized standards, and is consistent with the provisions of the Statute, the Rules, the Joint Code of Conduct, the Code of Conduct for Defence Counsel and Legal Representatives of Victims, the Directive, and other relevant provisions.¹⁵⁵ Most counsel REDRESS has consulted understand the need to assess counsel performance, though some have expressed worries that the wish to monitor them reflects a wider distrust within the Court of the role of external counsel.

REDRESS is in favour of the creation of oversight mechanisms to ensure that victims receive quality legal representation. However, these should follow set criteria which counsel should help design. Monitoring and/or potential sanction of counsel's conduct requires clearly defined standards and a transparent process. This is important to ensure that counsel are clear on standards they are expected to meet, and gives faith to the process when allegations are made that those standards have been breached.

Similar to the ICC counsel disciplinary process, the counsel community via a body such as the proposed association of counsel practising before the ICC, should have a leading role in any oversight process. The self-regulation of the legal profession is recognised as a key principle to guarantee lawyers' professional independence.¹⁵⁶ In particular, the process should be independent from the Registry as the body appointing counsel and administering legal aid.¹⁵⁷ Similar considerations are reflected in other instruments relating to the provision of legal aid and the role of legal aid providers.¹⁵⁸

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1. The Registry shall take measures in order to monitor that *inter alia*:
 - (a) Victims assigned to a legal representative are continually informed about the proceedings affecting their interests and consulted, to the extent possible;
 - (b) Victims have not been unduly exposed to safety risks as a result of their interaction with the legal representative;
 - (c) Victims' physical and psychological well-being, dignity, or privacy have been respected by their legal representative;
 - (d) The number of victims assigned to a legal representative or the complexity of the case are considered when allocating resources.
 2. When fulfilling their functions, including those listed in paragraph 1, legal representatives of victims shall comply with the Code of Professional Conduct for counsel.

¹⁵³ Interview with VPRS official, November 2013 and January 2015.

¹⁵⁴ See, e.g., *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, UN Doc A/HRC/23/43, 15 March 2013, at 42. The Special Rapporteur has indicated that 'the providers of legal aid should, moreover, be held accountable for the services they offer as a means to ensure the quality of legal advice, counsel and representation, and proper and adequate access to the court system.'

¹⁵⁵ Art 30 STL Victims Directive.

¹⁵⁶ See, e.g., Council of Bars and Law Societies of Europe, 'Charter Of Core Principles Of The European Legal Profession And Code Of Conduct For European Lawyers', Brussels, 2013: 'The CCBE is convinced that only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their Professional and legal role.'

¹⁵⁷ International Bar Association's Human Rights Institute, 'Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC', November 2012, at 7 available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=156FBA79-7A9D-4BD2-93D6-A81A91A4FFBA>; Comments expressed by counsel and civil society participants during a seminar organised by the Registrar with relevant stakeholder on the proposed amendments to the Regulations of the Registry, 4-6 July 2012.

¹⁵⁸ The *Guidelines for the implementation of principles on legal aid in criminal justice systems* recommend the setting up by states of legal aid bodies, adding that such bodies should have the powers to provide legal aid including the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them. It suggests that the legal aid body ought to be different from the body handling complaints. Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc E/CN.15/2012/L.14/Rev.1, 2012.

However, the specificity of the LRV role may require that those carrying out the monitoring have sufficient knowledge and experience of representing large groups of victims. At the STL, an internal process is envisioned. The Chief of the Victims' participation unit can receive information 'from any source' relating to the effectiveness of representation and, in case of serious concerns, 'shall, initially on a confidential basis, advise the lead counsel [...] and invite them to informally discuss these concerns with him.'¹⁵⁹ Within 15 days of that discussion, the Chief can decide to begin monitoring the performance and work of the person concerned and shall inform the Lead counsel and legal team member concerned, in a written reasoned decision specifying the length and the modalities of the monitoring. At the end of the monitoring, a reasoned written decision is rendered.¹⁶⁰ Under this system, the monitoring of counsel is well-defined and there are safeguards against arbitrary intervention. Nonetheless, the process is internal which may be inappropriate as a model for the ICC.

¹⁵⁹ Article 32 STL Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the STL.

¹⁶⁰ The outcome can be:

- (i) The monitoring did not give rise to a finding of ineffective representation;
- (ii) The representation was not completely effective but the measures undertaken during the monitoring period have resolved the problems; or,
- (iii) The representation was ineffective and warrants the implementation of measures in accordance with Rule 57(H), Rule 51(G)(iii) of the Rules or Part IV of this Code, as appropriate.

IV. Conclusion and Recommendations

REDRESS encourages the Judges and the Registry as appropriate to continue to consult with counsel, victims and others on the necessary structures to strengthen the quality of legal representation and to ensure to the greatest extent possible, victims' authority in designating their representation. The Court should ensure that its processes empower victims and give them sufficient agency in the exercise of their rights. Nowhere is this more apparent than in the handling of their legal representation.

We encourage the Registry to develop a policy document on victims' legal representation in which it describes the steps it will take to comply with Rule 90 of the Rules of Procedure and Evidence. We encourage the relevant chambers to devote greater space in their decisions to evaluate whether joint representation is appropriate at the particular stage of the case in which it is being considered, and to afford victims with a veritable first opportunity to choose a CLRV. Regulation 80 should be used only as a last option if at all, once Rule 90 has been exhausted. When Chambers decide to appoint a CLRV, they should cite the legal basis for that appointment, as this will determine whether victims have any right to review. The Presidency should also consider revising Regulation 80 so that victims are not denied an opportunity to review counsel appointments.

We encourage the Registry to work with the legal profession, victims and others as appropriate to develop and implement a transparent framework for assessing LRV and CLRV conduct and supporting counsel to better serve the needs and rights of their clients. We encourage the Registry, ideally through the proposed association of counsel practising before the ICC, to organise training and peer support for counsel to ensure that they have the possibility to tackle the specific challenges of the role, to request the appropriate budget for effective representation and provide the necessary logistical support to counsel to enable them to do their jobs.

Any monitoring or complaints body, whether a modified disciplinary process or a separate process to tackle under-performance should follow clear procedures, be sufficiently impartial, and ensure victims' effective access to it to lodge complaints and to receive information on follow-up.

As part of its ongoing ReVision project, the Registry should equally consider devoting specific attention to how concretely any new set up will better assist victims to be adequately and effectively represented in proceedings.